NO. 20150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO and
JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WILLIAM B. BEIRNE
408 South Spring Street
Los Angeles, California 90013

A. L. WIRIN
FRED OKRAND
257 South Spring Street
Los Angeles, California 90012

Attorneys for Appellant,
Paul John Carbo.

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Preliminary Statement

Appellee devotes considerable time recounting the previous history of the case. This, of course, is perfectly proper, but if by so doing, appellee seeks to convey the impression that the question before the Court on this appeal is, or could have been, raised or disposed of during that previous history, such is not the case. The first time appellant or his counsel knew, or had any reason to believe, that prior to his appointment as successor judge, Judge Boldt had discussed the case or that he had any knowledge of the case or Judge Tolin's views thereon, was after all the appeal procedures, including Petition for Writ of Certiorari in the United States Supreme Court, had been exhausted, and at the very end of

the motion for modification of sentence proceedings after the mandate had been returned to the Trial Court (CT 7). 1/

Appellee points out (Br. 15) that Judge Boldt in his affidavit stated that the views of the case he had referred to in his statement from the bench on July 17, 1964 were that Judge Tolin considered the offense extremely serious and that he got these views "from the appearance and manner of Judge Tolin which to me indicated he was laboring under a heavy burden of concern and strain" and that "from such impression I believe Judge Tolin in all probability would have imposed heavier sentences than were fixed by me." (Exh. 1). To appellant, at least, these are but meaningless words; to say that one can look at a man and from the fact that he appeared to be laboring under a heavy burden deduce from that alone that he would have imposed a heavier sentence, is difficult to understand. And the Court foreclosed any inquiry into making it understandable and credible. The only explanation is that because judges are human, the trial judge here was emotionally involved in the situation, which is, of course, the reason for the rule that one should not sit as a judge on his own conduct.

1/ Sometimes, even though a court has passed upon a point in a case, it is necessary and proper that it pass upon it again, if it be convinced that it was in error in the first instance. (Chessman v. Teets, 354 U.S. 156, 165, 1 L.ed.2d 1253, 1260, 77 S.Ct. 1127). But that consideration is not involved in the case at bar. Appellant did appeal from the Trial Court's order denying modification of sentence (# Misc. 2165 in this Court), but withdrew that appeal (letter of Dec. 29, 1964), upon his counsel being convinced that the matter could not be reached in such an appeal but was properly presentable in a motion pursuant to 28 U.S.C. 2255.

Appellee points out (Br. 16) that "only one witness testified at the hearing; . . . the court reporter who had recorded Judge Boldt's statement of July 17, 1964, concerning Judge Tolin's 'views' . . . . " But, of course, there would have been more had the Trial Court permitted it, namely, Judge Boldt himself who had made the statement about Judge Tolin's views.

I

THE DOCTRINE OF CORUM NON JUDICE HAS APPLICATION HERE (Reply to Appellee's Point V, A, pp. 21-32)

Appellee's criticism (Br. 21) of the order in which appellant argued his case in his Opening Brief, is unwarranted. It is perfectly logical for a litigant who has been deprived of the opportunity to develop the facts in support of his case, to complain thereof at the outset, for the purpose of a hearing, included a hearing under §2255, is to develop the facts. "[A] hearing and only a hearing will elucidate the facts and assure a fair administration of justice." (Harris v. United States, ___ U.S. ___, 34 U.S. Law Week, Dec. 6, 1965). However, for ease in following the argument, appellant will adhere to appellee's format in replying to appellee's brief.

Appellant does not urge, as appellee suggests (Br. 22) he does, "that if a judge knows anything about the matter before him that was derived from sources outside the courtroom, he is automatically disqualified from sitting on the case." It is, of course,

a matter of what information the judge has received, from whom and how it was obtained, the circumstances thereof, etc. For example, it may well be that a judge may reject newspaper comment, much as he does incompetent and prejudicial evidence that is proffered in court. But can he, and will he, similarly purge from his mind what a judge who presides over a case tells him? A judge occupies a special status when he sits in a case and knows the whole thereof, and his remarks have greater impact and higher accreditation than would accrue from conversation or information from others.

Nor does appellant's contention mean that a judge who presides at a case should not talk or express his views to his wife, or his law clerk, a fellow judge or anyone else. Nor is it improper for such persons to listen to those views. The consequence of appellant's position is merely that when a judge presiding over a case has conveyed his views to a fellow judge in the, happily, rare instance when the first judge dies before having passed upon a motion for new trial, that fellow judge should not sit on the motion for new trial. The effect of this position imposes no difficulty on the administration of justice. Any one of the more than 300 other District Judges could sit on the case.

It must be remembered that a judge passing upon a motion for new trial is sitting as a 13th juror, 2/ and that a defendant is

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2/ Applebaum v. United States, 274 F. 2d 43, 46 [CCA 7 1921]; see also, Rees v. United States, 95 F. 2d 784, 791 [CCA 4 1938] and Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216, 91 L. ed. 849, 852, 67 S. Ct. 752: "Determination of whether a new trial should be granted ... calls for the judgment in the first (Continued)

entitled and expects that he will exercise that function corum judice.

Appellee points out (Br. 23) that Judge Boldt familiarized himself with the evidence in the case. But appellant does not know whether Judge Boldt acted from the evidence or from Judge Tolin's views. When he first made the statement on July 17, 1964, Judge Boldt did not say that "from the record" he could affirm that his sentences were more lenient than those Judge Tolin would have imposed. He said (Exh. 1) "from that", namely, from the fact that he "had occasion to see Judge Tolin after the verdict in this case ... and I had some ideas of his views of the case", that he could so affirm. Had Judge Boldt said, or had the fact been (a matter upon which appellant was denied the opportunity to present evidence), that Judge Boldt's views came from Judge Tolin's views as expressed in the record, we would have a different case.

The quotation (Appellee's Br. 23-24) of what Judge Boldt said at the time of sentencing refers to the record of the case; this appellant understood. But Judge Boldt was not then, or at least he did not disclose that he was, speaking of matters derived from Judge Tolin outside the record of the case. Similarly, the quotation (Appellee's Br. 25) of what this Court said in affirming the conviction, refers to matters Judge Boldt obtained corum judice

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2/ (Continued): instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcription can impart. ... Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone ..."

-- the words of Judge Tolin as expressed in the record. But after the case was all over, appellant learned for the first time that there were matters off the record communicated to Judge Boldt; precisely what, appellant does not know; Judge Boldt refuses to tell.

Appellee is incorrect in its statement (Br. 26) that appellant does not contend Judge Boldt relied on information received directly from Judge Tolin in making his rulings. Appellant, admittedly, does not know. But the reason for this is that Judge Boldt prevented him from presenting the facts, would not state what they were and sat in judgment over his own conduct.

As we have previously sought to make clear, appellant is not contending, as appellee seems to assert he does (Br. 26), that a judge would be prohibited from discussing a case with his law clerk or his wife. Moreover, the analogy is twisted. There is no likelihood that a law clerk or a wife would be passing upon a motion for new trial after having received the views of the judge. And in the rare instance, if one should occur, that subsequent to obtaining the views of the judge, that judge should die and the law clerk or wife should be appointed judge, he or she ought not pass upon the motion for new trial.

The fact that at the time of sentencing the judge has before him a probation report which contains material outside the record of the trial does not detract from appellant's contention. The matter of sentencing is a far different thing from passing upon a motion for new trial where the judge, sitting as a thirteenth juror, passes upon weight, sufficiency, credibility etc. See supra, pages

4 and 5, footnote 2.

It is true that often the judge passes upon a motion for new trial at the same session set for passing of sentence. But the judge knows that statements in a probation report are the work of the probation officer; they do not carry the same accreditation as the statements of a fellow judge who sat in the case. Moreover, it may well be -- and although not necessary for the decision in this case, the fact that this case arose and appellant's argument is being made to this Court, may furnish an opportunity for this Court to so declare -- that the procedure of the Court having and considering the probation report before passing upon a motion for new trial, should be re-examined. This, for the very reason of insuring that the motion for new trial will be based only upon the record.

As is evident, appellant disagrees with appellee (Br. 32) that the filing by Judge Boldt of his affidavit completely, or at all, disposes of the issue. That affidavit raised further factual problems, the effect of which should have been decided by a different judge in a proceeding wherein Judge Boldt would testify as a witness.

II

THIS IS NOT A 28 U.S.C. 144 CASE (Reply to Appellee's Point V, B; pp. 33-38).

Appellee misapprehends the point being made by appellant. Appellant does not contend that the judge who presided at the trial, or even a successor judge who presided at the motion for new trial, is not, ordinarily, the appropriate judge to pass upon a §2255 Motion. Nor does appellant contend that this is a case that involves the bias and prejudice of a judge. This is a case where, because of facts which appear on the record, it is necessary for the judge who presided at the motion for new trial to be a witness and, therefore, it is improper for that judge to preside at the hearing where rulings as to his own conduct have to be made.

Accordingly, none of the cases appellee cites (pp. 35-36) as to the sufficiency of affidavits under 28 U.S.C. 144 is in point. The problem is not one of bias or prejudice, but is concerned with the basic truism, a truism which, as appellant has pointed out in his Opening Brief, is bottomed on the Constitution and due process of law, that one cannot be a judge in his own case.

Appellee is incorrect in its assertion that (Br. 36-37) In re Federal Facilities Realty Trust, 140 F.Supp. 522 (N.D. Ill. 1956), is authority for the proposition that §144 must be followed in a case such as at bar. Presumably, appellee is referring to the sentence immediately following the sentence quoted by appellant at page 25 of his Opening Brief, namely, that "[t]he

latter type determination (attitudes and conceptions that have their origins in sources beyond the four corners of the court room) is the 'personal prejudice' that the statute guards against; the former type determination (derived from evidence and lengthy proceedings in court) is not." But the Court there was not laying down any all embracing rule of procedure, and it certainly was not passing upon a fact situation where the judge was required to be a witness in the case. All the Court was saying, and all it could be saying from the fact situation in that case, is that determination by a judge from the record of the case, cannot be the subject of an affidavit of prejudice.

But even if appellant is incorrect in his contention that he need not have followed the §144 procedure in order that the issue be presented as to whether Judge Boldt should, at the beginning, preside at the hearing on the §2255 Motion, the matter should be remanded to afford appellant the opportunity to follow that procedure. But, again on the assumption that appellant initially should have followed §144, remand for that purpose is not necessary because it became abundantly clear as the hearing progressed and when Judge Boldt refused to permit himself to be called as a witness and precluded appellant from developing the facts (RT 53-66), that it was improper for him to go forward, pass upon his own conduct and thereafter render judgment in the case. At that point, at least, during the proceedings, the unfairness of the "spectacle" (In re Murchison, 349 U.S. 133, 139, 90 L.ed. 942, 948, 75 S.Ct. 623) was manifest.

III

THE PROCEEDINGS BELOW BOTH WERE AND GAVE THE APPEARANCE OF BEING UNFAIR (Reply to Appellee's Point V, C; pp. 39-40). 3/

With due respect, appellant disagrees with appellee's assertion that the proceedings in the District Court did not "give even the appearance of unfairness." One cannot, we submit, read the record (RT 53-66) without coming to the contrary conclusion.

Appellee's assertion (Br. 40) that because Judge Boldt filed an affidavit, that ends the matter, demonstrates the incorrectness of its view. It is that affidavit which itself is involved in the question; it presented a different picture from either of the two previous statements of the judge; it called for inquiry and explanation, not ex parte but in the normal manner of a court inquiry. This was not what occurred; it should have. 4/

3/ In addition to the cases cited in appellant's Opening Brief, pp. 31-35, see also the recently decided Rapp v. Van Dusen, 350 F. 2d 806, 812 (CA 3 1965).

4/ Cf. Draper v. Washington, 372 U.S. 487, 498, 9 L. ed. 2d 899, 907, 83 S. Ct. 774.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

WILLIAM B. BEIRNE

A. L. WIRIN

FRED OKRAND

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND